LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court.
FILED
MAY 29 1967
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

October Term, 1966

No. 1453 302

ADAM DI MICHELE,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

LESTER J. SCHAFFER,
Attorney for Petitioner.

1610 Two Penn Center Plaza,
Philadelphia, Pa., 19102.

Merrill Printing Company, Law Printers, 231-235 Lockwood Street, Dover, Pa.

Case Caption

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

No.

Adam DiMichele,

Petitioner

vs.

United States of America,

Respondent

PETTTION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Adam DiMichele, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit affirming the judgment of the District Court of the United States for the Eastern District of Pennsylvania.

OPINION BELOW

The Per Curiam Opinion of the Court of Appeals for the Third Circuit (Judges McLaughlin, Hastie and Freedman) was filed on May 3, 1967 and has not been officially reported. (Attached hereto as Exhibit A).

BASIS OF JURISDICTION

The jurisdiction of this Court is involved under the Act of June 25, 1948 C. 646, 62 stat. 928 (28 U.S.C. 1254).

QUESTION PRESENTED

Where a witness before a grand jury had been apprehended in a raid by agents of the Federal Bureau of Investigation and then and there subpoenaed to appear to testify at a later date, was he not entitled at the time of his appearance before the grand jury to be advised of the nature of the proceedings and of his constitutional rights under the Fifth and Sixth Amendments prior to testifying and, in the absence of such advice, may he properly be convicted of perjury on the basis of such testimony?

STATEMENT OF THE CASE

Petitioner was indicted under the perjury statute (18 U.S.C.A. 1621) for giving false testimony before a duly impaneled grand jury which was conducting an investigation under the Interstate Racketeering Act (18 U.S.C.A. 1952).

The two count indictment charged that petitioner lied when he said he had not been in 1237 South 7th Street, Philadelphia on September 5, 1965 and when he denied that he had made a statement to two F.B.I. agents that he had broken into the rear of the house directly behind 1237 South 7th Street.

The testimony at the trial may be briefly summarized. On the date in question, twenty F.B.I. agents staged a planned raid on 1237 South 7th Street, by reason of information that there was a crap game being conducted on the premises. Armed with a search warrant, the agents ultimately gained access to the premises and apprehended certain individuals on the premises, for some of whom they had warrants of arrest.

Other agents were stationed at the rear of the raided premises and petitioner was apprehended coming out the door of 1236 Sheridan Street, which was directly behind 1237 South 7th Street. He was searched, taken to a Bureau car where, after being warned of his rights, he was questioned by two agents. In his statement petitioner admitted that he had been on the raided premises, but denied that he had been gambling. At the conclusion of

the "interview", he was handed a subpoena for his appearance before the grand jury.

When petitioner appeared before the grand jury, the transcript reveals that he was sworn but it does not reveal that he was advised of his rights under either the Fifth or Sixth Amendments.*

After his appearance before the grand jury, petitioner was indicted for two counts of perjury. A motion to dismiss was summarily dismissed by Honorable Harold K. Wood, and thereafter another motion to dismiss was filed (6a), along with a supporting affidavit (7a) which was argued just prior to the commencement of the trial before Honorable Alfred L. Luongo and again dismissed.

The case was tried to the latter judge and a jury commencing April 4, 1966 and ending on April 7, 1966 in a verdict of guilty on both counts.

A motion for a new trial and for judgment of acquittal was filed. Subsequently, petitioner advised the trial judge that the motion for a new trial would not be pressed.

After argument, the motion for judgment of acquittal was dismissed (13a).

On October 7, 1966, petitioner was given a suspended sentence and placed on probation under special terms for a period of five years.

An appeal to the Court of Appeals for the Third Circuit followed and in a Per Curiam Opinion filed May 3, 1967 the judgment was affirmed.

The present petition seeks to review the action of the Court of Appeals.

---

* The full transcript of appellant's testimony before the grand jury appears in the Appendix starting at page 9a.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT AND ARGUMENT IN SUPPORT THEREOF

---

1. The Court of Appeals, in holding that since petitioner had been warned of his rights when interrogated by the federal agents, he cannot complain of the lack of warning when he appeared before the grand jury, ignored the holding of this Court in its recent decisions, such as *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966).

2. There is no case in this Court which specifically rules on the question here presented, to wit, whether the failure to warn a grand jury witness of his constitutional rights, should vitiate a perjury conviction. The Court of Appeals refused to examine or pass upon the question.

3. The courts below relied upon the case of *United States v. Ponti*, 257 F. Supp. 925 (E.D. Pa. 1966) in which the court cited as authority the case of *United States v. Kahriger*, 345 U.S. 22, 97 L. Ed. 754 (1952). This Court has presently before it the question of whether or not *Kahriger* should be overruled: *Marchetti v. United States*, 385 U.S. 1000, 17 L. Ed. 2d 540 (1967).

4. The trend of the recent decisions in this Court requires a reexamination of the subject of the rights to be accorded witnesses before federal grand juries and specifically whether or not they should be clothed with the same constitutional protections as the admitted criminal.

Reasons for Allowance of Writ

(1)

The court below emphasizes the fact that at the time of his apprehension petitioner was advised of his constitutional rights and that apparently cured the failure to repeat the warnings when he appeared before the grand jury.

It would seem that it is more important to preserve rights at the time when petitioner was placed under oath, rather than before, since only then would he be placed in a position of possible incrimination, or be confronted with a "tri-lemma": *Murphy v. Waterfront Commission of New York,* 378 U.S. 52, 55, 12 L. Ed. 2d 678, 681 (1964).

In any event, this Court has held that "No amount of circumstantial evidence that the person may have been aware" of his rights will take the place of adequate warning: *Miranda v. Arizona,* 384 U.S. 436, 471-472, 16 L. Ed. 2d 694, 722 (1966).

Petitioner, had he been fully apprised of his rights, might have remained silent. Had he done so, he could not have committed perjury.

---

(2)

Twelve years ago, the late Judge Frank said in a dissenting opinion in *United States v. Scully,* 225 F. 2d 113 (2 Cir., 1955) at page 119:

> ". . . we confront virtual rulings by the Supreme Court that a witness—if not at the time the target of a prospective criminal action—need not be

warned. I think that, absent Supreme Court decisions indicating clearly a new doctrinal trend, we must leave to that Court a departure from that rule."

One year later, in his dissent in *United States v. Gruenwald*, 233 F. 2d 556 (2 Cir., 1956), the same judge said (footnote 10, page 576):

> "In United States v. Scully . . . I suggested that, were it not for Wilson v. United States . . . and Powers v. United States . . . I would hold that every witness before a grand jury should be advised of his privilege. When I so wrote, I could perceive no new doctrinal trend in the Supreme Court decisions. . . . But . . . such a trend has since developed."

There has been no case in which *every* constitutional safeguard was lacking. For example, in *United States v. Winter*, 348 F. 2d 204 (2 Cir., 1965), the court emphasized that the defendant had been warned time and again not only by the United States attorney, but also by the foreman of the grand jury, of his right to remain silent. We agree that where a witness clearly understands that he might remain silent, there is no reason why he should not be prosecuted for false testimony. His right to counsel becomes important only when there is some doubt as to his understanding of his Fifth Amendment rights.

Petitioner here received no advice as to any of his rights after being placed under oath.

---

(3)

The court below cited with approval *United States v. Ponti*, 257 F. Supp. 925 (E.D. Pa. 1966) wherein it was

held that although admittedly as a witness before the grand jury petitioner was cloaked with constitutional protections, that extended only to *past* offenses and not to those which might be committed in the future.

There is no such limitation in the Fifth Amendment and if the court in *Ponti* relied upon *United States v. Kahriger*, 345 U.S. 22, 97 L. Ed. 254 (1952), such an authority is at least now suspect in view of *Marchetti v. United States*, 385 U.S. 1000, 17 L. Ed. 2d 540 (1967).

We suggest that the question of *past* as opposed to *future* crimes could not—and should not—have any bearing on a defendant's rights under the Sixth Amendment. A defendant's right to the advice of counsel, it would seem, very well might be to protect him against the "future" error of which this petitioner has been found guilty.

---

(4)

On May 15, 1967 this Court announced its decision in *Re Gault*, U.S. , L. Ed. 2d , 35 U.S. Law Week 4399 (1967).

If there were any doubt of a trend which was so obvious to Judge Frank many years ago, the opinion in this case should certainly remove it.

We recognize, of course, that *factually* the *Gault* case is readily distinguishable, just as are *Gideon, Miranda, Escobedo* et al. The point is that when one searches for a "trend", he looks at the *language* in the opinions not necessarily at the facts. Thus, in *Gault*, the majority said (35 L.W. 4413):

"It would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children. The language of the Fifth Amendment . . . is unequivocal and without exception."

We think that the same reasoning should apply to the ordinary witness. There should be no magical formula for the application of constitutional rights. Whether a person is a "defendant" or a mere "individual" should not be the test. This Court has never wavered in upholding the right of every individual to the protection of our Constitution.

We urge this Court to hold, in line with its recent decisions, that witnesses before federal grand juries must be apprised of all of their constitutional rights before any testimony given there may form the basis for *any* prosecution against them, including one for perjury.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this case is one which justifies the allowance of a Writ of Certiorari, and that this Court should thereafter review and reverse the adverse decision of the Court below.

LESTER J. SCHAFFER,
Attorney for Petitioner.

Exhibit A

EXHIBIT A

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 16,280

United States of America,

v.

Adam DiMichele,

Appellant

Appeal from the United States District Court for the Eastern District of Pennsyvania

---

Argued March 9, 1967

Before McLaughlin, Hastie and Freedman, Circuit Judges

OPINION OF THE COURT

(Filed May 3, 1967)

Per Curiam:

Appellant was convicted of perjury arising out of his testimony while appearing as a witness before a federal grand jury which was investigating suspected violations of Title 18 U.S.C. §1952 relating to interstate travel and

transportation in aid of racketeering. The indictment of appellant charged that it was material to said investigation that the grand jury should know and be informed with respect to a "crap game which was being conducted on the premises of 1237 South 7th Street, Philadelphia, on Sunday, September 5, 1965, and whether Adam DiMichele had knowledge of any such violation."

On September 5, 1965 Federal Bureau of Investigation Agents, having search, seizure and arrest warrants, raided a gambling game operating at 1237 South 7th Street, Philadelphia, allegedly in violation of Title 18 U.S.C. §1952, Interstate Transportation in Aid of Racketeering Enterprises. During the raid appellant was seen leaving the said place through a back window which led to a sloping roof. Eventually he worked his way into and through a house on the next street where he was met by F.B.I. Agents. At that time he was fully advised of his right to remain silent and to counsel. Appellant told the Agents he had been in the place when it was raided and described his departure. He was then given a subpoena to appear before a federal grand jury fifteen days later. He did appear, was sworn to tell the truth, denied his presence in the gambling place and that he had so admitted to the Agents. He also denied that when he had heard the F.B.I. Agents at the front door of 1237 South 7th Street he left the scene by going through a house on Sheridan Street which was directly behind 1237 South 7th Street. He did not testify at the trial or offer any defense evidence. He was convicted and placed on probation.

Appellant's entire argument is based upon the theory that the law should be changed to provide that a witness before a grand jury must be warned of his right to counsel

and of his right against self incrimination. There was no denial at trial or any other time that, prior to appellant being served with a subpoena to testify, he was specifically advised that he had the right to remain silent and the right to counsel. He actually had over two weeks after that in which to consult an attorney if he had so desired. All of the above is simply ignored by appellant and he confines himself to the contention that he received no warnings of any kind *when* he appeared before the grand jury. He substantially concedes, as is the fact, that under the existent law a grand jury witness, which is all that appellant was, is not entitled to a warning of right to counsel and to remain silent. United States v. Miller, 80 F. Supp. 979 (E.D. Pa. 1948); United States v. Ponte, 257 F. Supp. 925 (E.D. Pa. 1966); United States v. Scully, 225 F. 2d 113, 116 (2 Cir. 1955); United States v. Parker, 244 F. 2d 943 (7 Cir. 1957); United States v. Orta, 253 F. 2d 312 (5 Cir. 1958); United States v. Winter, 348 F. 2d 204 (2 Cir. 1965). There is no charge of fraud or duress here nor do we find the slightest indication of any such element in our own examination of the record.

The Government also strongly urges that the failure to advise a witness in the grand jury room of the right to silence and counsel in any event would not be a valid defense to a perjury charge. In this appeal there is no necessity of examining and passing upon that proposition. We refrain from so doing at this time.

The judgment of the District Court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 202

ADAM DI MICHELE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 11–13) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 1967. The petition for a writ of certiorari was filed on May 29, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was properly convicted for perjury before a grand jury, although he was not advised of his rights against self-incrimination and

to the assistance of counsel when he was called to testify.

STATEMENT

Petitioner was convicted in a jury trial in the United States District Court for the Eastern District of Pennsylvania on two counts of an indictment charging him with having committed perjury, while testifying as a witness before a grand jury, which was investigating suspected violations of 18 U.S.C. 1952 relating to interstate travel and transportation in aid of racketeering (App. 1a, 3a–5a).[1] On October 7, 1966, petitioner was given concurrent sentences of probation for five years and fined $500 (App. 2a). On appeal the conviction was affirmed.

Evidence at the trial showed that on September 5, 1965, F.B.I. agents, having search, seizure and arrest warrants, raided a gambling game operating at 1237 South 7th Street, Philadelphia, Pennsylvania. During the raid petitioner was seen leaving through a back window. He worked his way through a house on the next street (Sheridan Street) where he was met by F.B.I. agents. At that time he was fully advised of his right to remain silent and to counsel. Petitioner told the agents he had been in the place when it was raided and described his departure. He was then given a subpoena to appear before a federal grand jury fifteen days later (Pet. 12).

When petitioner appeared before the grand jury, he was administered the oath but was not again

[1] "App." refers to appellant's printed appendix in the court below (C.A. 3, No. 16,280), which is part of the record in this Court.

advised of his rights under the Fifth and Sixth Amendments. He testified that he had not been at 1237 South 7th Street on the day in question (count 1) (App. 9a). He also denied making a statement to two agents that he had broken into a house on Sheridan Street directly behind 1237 South 7th Street after hearing agents at the front door (count 2) (App. 10a).

ARGUMENT

Petitioner was called before the grand jury as a witness. He was not in custody when he appeared. He was not the target of the investigation, nor was he indicted for offenses with which the investigation was concerned. In these circumstances there was no requirement that he be warned of his constitutional rights against self-incrimination and to assistance of counsel before he testified before the grand jury. *United States* v. *Parker,* 244 F. 2d 943 (C.A. 9), certiorari denied, 355 U.S. 836; *United States* v. *Orta,* 253 F. 2d 312 (C.A. 5), certiorari denied, 357 U.S. 905; *United States* v. *Scully,* 225 F. 2d 113 (C.A. 2), certiorari denied, 350 U.S. 897; *United States* v. *Winter,* 348 F. 2d 204 (C.A. 2), certiorari denied, 382 U.S. 955; *United States* v. *Ponti,* 257 F. Supp. 925 (E.D. Pa.). The rationale of *Miranda* v. *Arizona,* 384 U.S. 436, dealing with custodial interrogation of a person suspected of having committed a crime, has no application to this situation.

In any event, even assuming *arguendo* that petitioner should have been warned of Fifth and Sixth Amendment rights immediately prior to his grand

jury testimony, the failure to give such warnings would not condone his deliberate perjury. See *United States* v. *Winter*, 348 F. 2d 204 (C.A. 2), certiorari denied, 382 U.S. 955; cf. *United States* v. *Williams*, 341 U.S. 58, 65–69; *Dennis* v. *United States*, 384 U.S. 855, 866. That principle is particularly applicable here where petitioner admittedly had been advised by F.B.I. agents on the day of the raid that he had a right to remain silent and a right to counsel.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

JUNE 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967